

## § 240.10

## 16 CFR Ch. I (1–1–11 Edition)

for each unit purchased, and use it to reimburse these customers for the cost of advertising the seller's product.

*Example 3:* A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first \$1,000 purchased per month, 2 percent of the second \$1,000 per month, and 3 percent of all over that.

*Example 4:* A seller should not identify or feature one or a few customers in its own advertising without making the same service available on proportionally equal terms to customers competing with the identified customer or customers.

*Example 5:* A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.<sup>1</sup>

*Example 6:* A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of \$1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the \$1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of \$2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.

*Example 7:* A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing \$100 to Buyer A, \$50 to Buyer B, and \$25 to Buyer C, to be used for the Buyers' expenditures on promotion.

<sup>1</sup>The discriminatory purchase of display or shelf space, whether directly or by means of so-called allowances, may violate the Act, and may be considered an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.

### § 240.10 Availability to all competing customers.

(a) Functional availability:

(1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate. When a seller provides alternatives in order to meet the availability requirement, it should take reasonable steps to ensure that the alternatives are proportionally equal, and the seller should inform competing customers of the various alternative plans.

(2) The seller should insure that promotional plans or alternatives offered to retailers do not bar any competing retailers from participation, whether they purchase directly from the seller or through a wholesaler or other intermediary.

(3) When a seller offers to competing customers alternative services or allowances that are proportionally equal and at least one such offer is useable in a practical sense by all competing customers, and refrains from taking steps to prevent customers from participating, it has satisfied its obligation to make services and allowances "functionally available" to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act.

*Example 1:* A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer's customers are too small this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them.

*Example 2:* A seller furnishes demonstrators to large department store customers. The seller should provide alternatives useable in a practical sense on proportionally equal terms to those competing customers who cannot use demonstrators. The alternatives may be services useable in a practical sense that are furnished by the seller, or payments by the seller to customers for their advertising or promotion of the seller's product.

*Example 3:* A seller offers to pay 75 percent of the cost of advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, but a lesser amount, such as only 50

percent of the cost, or even nothing at all, for advertising in semi-weekly, weekly, or other newspapers or media that may be used by small retail customers. Such a plan discriminates against particular customers or classes of customers. To avoid that discrimination, the seller in offering to pay allowances for newspaper advertising should offer to pay the same percent of the cost of newspaper advertising for all competing customers in a newspaper of the customer's choice, or at least in those newspapers that meet the requirements for second class mail privileges. While a small customer may be offered, as an alternative to advertising in daily newspapers, allowances for other media and services such as envelope stuffers, handbills, window banners, and the like, the small customer should have the choice to use its promotional allowance for advertising similar to that available to the larger customers, if it can practicably do so.

*Example 4:* A seller offers short term displays of varying sizes, including some which are useable by each of its competing customers in a practical business sense. The seller requires uniform, reasonable certification of performance by each customer. Because they are reluctant to process the required paper work, some customers do not participate. This fact does not place the seller in violation of the functional availability requirement and it is under no obligation to provide additional alternatives.

(b) Notice of available services and allowances: The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances. Such notification should include enough details of the offer in time to enable customers to make an informed judgment whether to participate. When some competing customers do not purchase directly from the seller, the seller must take steps reasonably designed to provide notice to such indirect customers. Acceptable notification may vary. The following is a non-exhaustive list of acceptable methods of notification:

(1) By providing direct notice to customers;

(2) When a promotion consists of providing retailers with display materials, by including the materials within the product shipping container;

(3) By including brochures describing the details of the offer in shipping containers;

(4) By providing information on shipping containers or product packages of

the availability and essential features of an offer, identifying a specific source for further information;

(5) By placing at reasonable intervals in trade publications of general and widespread distribution announcements of the availability and essential features of promotional offers, identifying a specific source for further information; and

(6) If the competing customers belong to an identifiable group on a specific mailing list, by providing relevant information of promotional offers to customers on that list. For example, if a product is sold lawfully only under Government license (alcoholic beverages, etc.), the seller may inform only its customers holding licenses.

(c) A seller may contract with intermediaries or other third parties to provide notice. See § 240.11.

*Example 1:* A seller has a plan for the retail promotion of its product in Philadelphia. Some of its retailing customers purchase directly and it offers the plan to them. Other Philadelphia retailers purchase the seller's product through wholesalers. The seller may use the wholesalers to reach the retailing customers that buy through them, either by having the wholesalers notify these retailers, or by using the wholesalers' customer lists for direct notification by the seller.

*Example 2:* A seller that sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its product at the retail level. If the seller directly notifies competing direct purchasing retailers, and competing retailers purchasing through the wholesalers, the seller is not required to notify its wholesalers.

*Example 3:* A seller regularly promotes its product at the retail level and during the year has various special promotional offers. The seller's competing customers include large direct-purchasing retailers and smaller retailers that purchase through wholesalers. The promotions offered can best be used by the smaller retailers if the funds to which they are entitled are pooled and used by the wholesalers on their behalf (newspaper advertisements, for example). If retailers purchasing through a wholesaler designate that wholesaler as their agent for receiving notice of, collecting, and using promotional allowances for them, the seller may assume that notice of, and payment under, a promotional plan to such wholesaler constitutes notice and payment to the retailer. The seller must have a reasonable basis for concluding that the retailers have designated the wholesaler as their agent.